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HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1953

No. ~~414~~ 15

AUSTIN MCFEE, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI AND SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, Austin F. McFee, moves for leave to file the attached Supplement to Petition for Writ of Certiorari, and in support thereof states:

The judgment of the United States Court of Appeals for the Ninth Circuit was entered August 24, 1953. Petitioner's motion for an extension of time to file his petition for Writ of Certiorari to October 23, 1953, was filed September 16, 1953 and was granted September 17, 1953. The petition was filed October 15, 1953. The facts disclosed by the attached Supplement to Petition for Writ of Certiorari were not known to, or learned by, petitioner's undersigned counsel until October 29, 1953. If these facts are true, the peti-

tioner was wrongfully convicted on the first count, and there is grave doubt as to his guilt on the second count.

The petitioner was convicted by a jury on two counts of an indictment for wilful attempts to defeat and evade income taxes due and owing by him for the years 1945 and 1946 in violation of section 145(b) of the Internal Revenue Code, 26 USC, sec. 145(b). He was sentenced to imprisonment and fine on each count. The imprisonment on the second count was to run consecutive to the term of imprisonment on the first count, but was to be suspended conditionally, on payment of his civil tax liability. He is now on bail.

The prosecution's case was wholly dependent upon circumstantial evidence. The evidence of unreported income was presented in the form of "unexplained" expenditures and net worth computations showing an increase in net worth between the beginning and end of the year 1945 and the beginning and end of year 1946. There was no direct evidence of unreported income.

Subsequent to the trial, the petitioner's accountants have examined and analyzed certain authentic records which disclose the source of all of the unexplained expenditures for the year 1945 and part of the unexplained expenditures for 1946. Photostats of those records, consisting of 73 pages, are attached to the original affidavit of John N. Newland, a certified public accountant, filed with the Clerk of this Court. In addition, as shown by Mr. Newland's affidavit, other authentic records of other additional assets, were located by him several months subsequent to the trial. The two groups of assets total $119,012.92. These assets were on hand at the beginning of the year 1945. They were not taken into account by the government witnesses in their unexplained expenditures and net worth computations. They should have been. Had they been, there would have been no unreported income whatever shown in their computations for the year 1945, and their computations for the year 1946 would have been erroneously over-

stated by at least $37,934.49 (or more than 50 per cent). This newly developed evidence shows that the defendant was wrongfully convicted on the first count involving the year 1945, and there is grave doubt of his guilt as to the second count involving the year 1946. The Supplement to the Petition together with the affidavits attached thereto, sets forth these facts.

In view of the unusual circumstances in this case, petitioner prays that the foregoing motion be granted.

ELDEN MCFARLAND
618 Southern Building
Washington 5, D. C.
Counsel for Petitioner

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No. 414

AUSTIN F. McFEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

The petitioner, McFee, was indicted, tried by a jury, convicted, sentenced to imprisonment and fined on each of two counts for wilful attempt to defeat and evade income taxes due and owing by him for the years 1945 and 1946, in violation of section 145(b) of the Internal Revenue Code, 26 USC, Sec. 145(b). The terms of imprisonment were to run consecutively. The imprisonment on the second count was suspended conditionally upon payment of all civil tax liability.

The prosecution's case was wholly dependent upon circumstantial evidence. This evidence was presented in the form of "unexplained" expenditures for each of the two years and net worth statements for the beginning and end of each year. The amounts of unexplained expenditures and of increase in net worth were presumed to be taxable

income. There was no other evidence, direct or indirect, of the defendant's receipt of unreported income.

The unreliability and inaccuracy of the circumstantial evidence relied upon by the prosecution as an essential element in this case, is demonstrated by the attached affidavits of John N. Newland, certified public accountant, and Austin F. McFee, petitioner. The records referred to in these affidavits, consisting of 73 pages, are attached to the Newland affidavit, the original of which, together with the original McFee affidavit, have been filed with the Clerk of this Court. These affidavits reliably indicate that the petitioner, McFee, was not guilty of the offense charged in the first count of the indictment covering the year 1945, and probably was not guilty of the offense charged in the second count.

The prosecution witness, Rice, referred to an item of $114,000 which admittedly, was not taken into account in the "unexplained" expenditures and net worth computations upon which the entire case of the prosecution was premised (R. 287-289). The affidavits attached hereto refer to this same item. They demonstrate that, at least to the extent of $119,012.92, the government witnesses' computations were in error. This amount was more than sufficient to account for the "unexplained" expenditures for 1945 (R. 18). And if such amount had been added to the opening net worth computation used by the prosecution for the beginning of 1945, as it should have been, the computation would have shown no net worth increase for 1945 and hence no unreported net income for that year. It also would have shown that the government's computations for the year 1946 were in error to the extent of at least $37,934.49. This casts grave doubt upon the question of criminal liability for the year 1946.

In addition to the amount of $86,528.59 disclosed by the records attached to the Newland affidavit, petitioner's accountants, in working on the settlement of the civil tax liability, subsequent to the criminal trial, have located other

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authentic records of additional assets, also not included by the government witnesses in the criminal trial, amounting to $32,484.33. This is shown by the Newland affidavit. The two amounts erroneously omitted by the government witnesses total $119,012.92.

While it is true that the existence of the records attached to the Newland affidavit were known prior to the end of the criminal trial, the ultimate facts disclosed by those records are not readily discernable and were not known or discovered until after the trial. The existence of the records disclosing the additional amount of $32,484.33 was not known or discovered until several months after the criminal trial.

The foregoing shows that the government's case lacked the essential prerequisite to all net worth-expenditure computations, namely a firm starting point. Cf. *United States* v. *Fenwick*, (7 Cir.), 177 F. (2d) 488, 492; *Bryan* v. *United States* (5 Cir.), 175 F. (2d) 223, 225, affd. 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335; *Gariepy* v. *United States* (6 Cir.), 189 F. (2d) 459, 461; *United States* v. *Venuto* (3 Cir.) 182 F. (2d) 519, 523; *James Quince Whittemore* v. *Commissioner*, 7 T.C.M. 845, 849.

Petitioner respectfully suggests that the case be remanded for retrial.

ELDEN MCFARLAND
618 Southern Building
Washington 5, D. C.

Counsel for Petitioner.

AFFIDAVIT

STATE OF MONTANA }
COUNTY OF SILVER BOW } ss

John N. Newland, being first duly sworn, says:

I am a Certified Public Accountant and have been practicing as such at Butte, Montana for the past ten years. The name of my firm is Newland and Blinn. Our offices are in the First National Bank Building in Butte.

I am familiar with the income tax problems of Austin F. McFee for the period from 1942 through 1946. Our firm represented Mr. McFee in the settlement of his civil income tax liability with the Internal Revenue Agents subsequent to the trial of his criminal case in April 1952. The settlement was mandatory as a practical matter under the terms of the probation arrangement contained in the trial court's criminal sentence.

Attached to this affidavit are true photostats of the bookkeeping records consisting of seventy-three (73) pages which Mr. McFee says reflected his transactions in alcoholic beverages which he obtained in Minnesota, transported to Idaho and distributed at cost and expenses to his own taverns and to other persons who operated business establishments where his vending and other coin operated machines were located. The profits were reflected on the books of the taverns and fully reported as income.

These records appear to be authentic, complete and accurate, and in my opinion they are. If they are authentic they provide a complete defense for Mr. McFee against the criminal charge for which he was convicted for the year 1945. I cannot state at the present time without further verification and comparison with the testimony of the government agents in criminal trial and other sources, the extent to which these records and other cash sources may form a defense for the year 1946. In addition to the amount of $86,528.59 indicated by these records as available to Mr. McFee, and not included by the government witnesses, we

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have located, subsequent to the time of the trial, other records showing an additional amount of $32,484.33 which we believe was also available to Mr. McFee and not included by the government witnesses.

These records record capital transactions. They demonstrate an available source of cash at the beginning of the year 1945 in the amount of $86,528.59 for Mr. McFee's so called "unexplained" expenditures which the government witnesses in the criminal trial included as income for 1945.

The testimony of the government witness Rice (R. 288) referred to this same subject matter as a $114,000 item which he admitted was not included in the opening net worth computation because he thought it was a "turnover" total and not a single item. The attached photostats demonstrate that the government witnesses were in error. The original investment was $109,940.00. This item, if properly treated, would have exonerated Mr. McFee for the year 1945 and probably in part for the year 1946 even under the government's own theory of the case.

The attached records show the original investment which was in August 1943, a cash account subsequent thereto, an inventory record and accounts receivable accounts. Their authenticity is further indicated by the fact that they contain many of the disbursements which were charged against the defendant as income in criminal trial, but which can be traced directly to these accounts and identified as capital and not income.

I was present at the trial of Mr. McFee and heard the testimony of the government agents, Olsen and Rice. After the testimony of Mr. Rice, Mr. McFee located these records in Wallace, Idaho and showed them to his attorneys but the purport of the records was not then realized because it required a more detailed analysis than could be made before the trial ended.

JOHN N. NEWLAND
John N. Newland

Subscribed and sworn to before me this 31st day of October 1953.

RHYNOLD C. AUCH
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission expires August 12, 1956

(SEAL)

(Exhibits attached to original)

AFFIDAVIT

STATE OF MONTANA }
COUNTY OF SILVER BOW } ss

Austin F. McFee, being first duly sworn deposes and says:

I am the petitioner named in the petition for writ of certiorari filed in the Supreme Court of the United States, October term 1953, numbered 414 and entitled Austin F. MeFee vs United States of America;

I have read the affidavit of John N. Newland, dated October 30, 1953, and am familiar with the original bookkeeping records, photostats of which are attached to Mr. Newland's affidavit. Those records were made and kept by my former employee, Helen Knoerr, whose address is 660 Locust Street, Mount Vernon, New York. They were kept in the ordinary course of business, the entries were made at or about the time the transactions which they reflected occurred, and I believe they are truthful, full and correct. The cash and other assets shown therein belonged to me.

In testifying before the trial court in my case, the government witnesses, Internal Revenue Agents Olsen and Rice did not include the assets shown in these accounts in

their computations of "unexplained" expenditures and of net worth for the years 1945 and 1946. If these assets had been included that would have completely cleared me of the charge for 1945 and I believe for 1946 also, inasmuch as there were additional amounts of at least $32,484.33 outside of these accounts not included by the government agents, records of which my accountants have discovered subsequent to my trial. I believe I truthfully reported all income for these two years in my returns as filed.

I am not an accountant or bookkeeper. The accounts attached to Mr. Newland's affidavit are somewhat involved and I did not know at the time of the trial just what the records of the account covering these transactions which occurred some seven or eight years back, would prove or establish, or what facts were needed or supposed to be established in my defense. And I have since learned that my defense lawyers also, were not familiar with accounting. At any rate, during the course of my trial and toward the end of the government's case, Revenue Agent Rice testified that he did not include the assets from this source in his computations because he said it was a "turnover" (R. 288). I knew he was wrong, so that evening I went to Wallace, Idaho and I searched through my papers and records to see what I could find and I found these records which I showed to my lawyers the next day, but the accounts themselves were so involved that they needed examination by an accountant to be sure as to what they meant, and besides it was then too late to get the bookkeeper that actually made the entries, as a witness. She lived in New York.

I intended to testify in my own behalf and expected to be called as a witness. I was much surprised when my at-

torneys suddenly concluded my defense without calling me. I would still like to have the chance to testify.

AUSTIN F. MCFEE
Austin F. McFee

Suscribed and sworn to before
me this 31st day of October 1953.

RHYNOLD C. AUCH
Notary Public for the
(Seal) State of Montana residing
at Butte, Montana. My
Commission expires August 12, 1956.

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